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Supreme Court, U.S.
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No. 95-1958

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WINFRED WAYLON JACKSON,
Petitioner,

v.

CITY OF ATLANTA, TEXAS, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 5, 1996

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QUESTION PRESENTED

Whether Title VII is the exclusive remedy for claims of racial employment discrimination for state or local government employees, so that such employees may not bring an action under 42 U.S.C. § 1983 when the only alleged basis for the § 1983 claim is a violation of the rights secured by Title VII?

LIST OF PARTIES

1. Winfred Waylon Jackson, Petitioner
2. Jim Long, Respondent
3. Peyton Childs, Respondent
4. Charles Riley, Respondent
5. John Pierce Ellis, Respondent
6. Randall Lee, Respondent

Other parties to the district court decision who were not parties to the appeal to the Fifth Circuit and thus are not parties in this Court:

1. City of Atlanta, Texas [1]

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[1]To the extent the City of Atlanta is required to enter an appearance before this Court, the undersigned counsel of record for the city officials hereby appears on behalf of the City for purposes of proceedings before this Court only.

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STATEMENT OF THE CASE

Respondents concur generally with Petitioner's statement of the case as set forth in his Petition, but add the following.

In his district court live pleading, Petitioner attempted to assert causes of action for violations of (1) Title VII, (2) 42 U.S.C. § 1983, and (3) 42 U.S.C. § 1981. Petitioner did not allege any constitutional violations. Petitioner supported each claim with the same nucleus of operative facts, which he summarizes on page 6 of the Petition. He acknowledges that Respondent Long informed him he was discharged for legitimate reasons, yet Petitioner claims he was terminated from his position as Fire Chief of the City of Atlanta, Texas, because of his race.

The United States District Court for the Eastern District of Texas, the Honorable William M. Steger, denied both the city's and the city official's motions to dismiss or for summary judgment on the above claims. The city officials, Respondents, appealed the interlocutory order to the United States Court of Appeals for the Fifth Circuit, as the grounds for their motion included qualified immunity. *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 2158 (1995). The City of Atlanta did not appeal.

In a per curiam opinion, without hearing oral argument, the Fifth Circuit first concluded that the denial of Respondents' motion to dismiss or for summary judgment as to the Title VII claim was a non-final pretrial order and not appealable under 28 U.S.C. § 1291. Lacking jurisdiction, the Fifth Circuit dismissed that portion of the appeal. Respondents filed a Petition for Panel Rehearing on this point, which was denied. As to the § 1983 claim, the court of appeals followed its precedent, *Irby v. Sullivan*, 737 F.2d 1418, 1429 (5th Cir. 1984), which held that a violation of Title VII cannot also support a § 1983 suit. However, most

important for the purposes of the Petition to this Court is the Fifth Circuit's qualification of the *Irby* rule. In *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), the court held that a plaintiff could pursue a remedy under § 1983 concurrently with Title VII when the employer's conduct violates both Title VII and a "*separate constitutional or statutory right*." Petitioner's App. 6a n.13. Finding that Petitioner did not identify a *separate* constitutional or statutory violation to support his § 1983 claim, the court concluded that Title VII was Petitioner's exclusive remedy for his allegations of racial discrimination.

SUMMARY OF ARGUMENT

This case creates no conflict with other circuit decisions. The Fifth Circuit has merely reaffirmed the principle that an employment discrimination plaintiff cannot base a § 1983 action on violations of rights created by Title VII, where no separate and independent alleged violations exist to support the § 1983 claim. The holding in this case is identical with the result in *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984), cited by Petitioner. It is also consistent with the collective reasoning of each circuit opinion upon which Petitioner relies. As no conflict exists among the circuits, Rule 10 jurisdiction is not invoked. Therefore, this Court should deny the writ.

ARGUMENT

REASONS FOR DENYING THE WRIT

PETITIONER DOES NOT INVOKE RULE 10 CERTIORARI JURISDICTION BECAUSE AN EXAMINATION OF THE AUTHORITY CITED BY PETITIONER REVEALS THAT NO REAL OR INTOLERABLE CONFLICT EXISTS AMONG THE CIRCUITS.

A. This case presents nothing more than an opportunity merely to reaffirm settled law.

The authority Petitioner cites is subject to only one reasonable interpretation. If a civil rights plaintiff alleges a violation of rights created by Title VII, then Title VII is that plaintiff's exclusive remedy. On the other hand, if a civil rights plaintiff alleges a violation of (1) rights created by Title VII, along with (2) constitutional or statutory rights separate from Title VII, then that plaintiff may bring a Title VII claim together with a § 1983 claim. In such a scenario, the § 1983 claim is based on rights independent of the Title VII claim. Section 1983 does not create substantive rights but only affords a remedy for existing federal rights created elsewhere. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). In the instant case, Petitioner did not identify a separate infringement apart from the "racial discrimination" allegation which supports his Title VII action. Thus, the Fifth Circuit correctly held Title VII to be Petitioner's exclusive remedy, based on his alleged facts. The decision creates no conflict with other circuits, or this Court, but only reaffirms settled law; therefore this Court should deny the writ. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting).

Although Petitioner cites 28 U.S.C. § 1254(1) as a jurisdictional basis for review, his challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule which identifies the character of reasons considered in the grant or denial of a petition for certiorari. The rule [10].1. states:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . .
>
> (c) . . . or has decided a federal question in a way that conflicts with applicable decisions of this Court.

SUP. CT. R. 10.

Neither criteria is met in this case.

B. The Fifth Circuit's decision is in harmony with other circuits and is consistent with a true reading of relevant legislative history.

1. *The circuits are in agreement.*

Petitioner argues the Fifth Circuit's decision is in conflict with: *Annis v. County of Westchester*, 36 F.3d 251 (2d Cir. 1994); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989); *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987); *Trigg v. Fort Wayne Community Sch.*, 766 F.2d 299 (7th Cir. 1985); and *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). Petitioner relies upon those decisions, collectively, as "holding that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from *violations of Constitutional rights*." Petition, p. 9 (emphasis added). Respondents do not dispute this proposition. Yet, Petitioner does not advise this Court that he has not alleged a violation of any constitutional right.

A careful analysis of the circuit decisions at issue demonstrates that Title VII has not "repealed by implication" § 1983's remedial provisions, as Petitioner contends. In *Annis v. County of Westchester*, 36 F.3d 251 (2d Cir. 1994), the plaintiff brought a sex discrimination lawsuit against her county employer alleging infringement of § 1983, § 1985, and her Fourteenth Amendment right to due process and equal protection. She did not plead a Title VII claim. The district court dismissed her lawsuit concluding that she must concurrently bring a Title VII action and follow that statute's procedures. *Id.* at 253.

Reversing, the Second Circuit held that an employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII.

Id. at 255. Moreover, *Annis* emphasized that its ruling was consistent with every other circuit that has considered the issue. In support, *Annis* cited all of the cases upon which Petitioner currently relies before this Court, as well as, notably, the Fifth Circuit's opinion in *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). *Annis*, 36 F.3d at 254 (". . .every circuit that has considered this issue has held that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from violations of Constitutional rights").

The Sixth Circuit reached a similar conclusion in *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984). *Day* is not in conflict with the instant case. In fact, the results reached in *Day*, and the results reached here, are identical. James Day, a white male, sued his county employer charging that he had been the victim of discrimination in violation of Title VII, § 1983, and § 1981. As here, Day did not assert constitutional violations. The court in *Day* began with the premise that where a statute provides a particular procedure and an exclusive remedy for violations, § 1983 is not available to obtain additional relief. *Id.* at 1202 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). Guided by this Court's analysis of Title VII in *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979),[2] the court stated that Title VII provides the

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[2]*Novotny* involved the availability of § 1985(3) in conjunction with Title VII where a discharged private employee claimed he was terminated in retaliation for supporting female coworkers who complained of disparate treatment. This Court reviewed the scope of Title VII and reasoned:

> If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and

exclusive remedy when the § 1983 cause of action is based only on a violation of Title VII. *Day*, 749 F.2d at 1204.

Day's clear holding applies with equal force here and demonstrates that certiorari must be denied. Where a state or local employee establishes conduct infringing on both Title VII and rights derived from another source which existed at the time of Title VII's enactment, the claim based on the other source is independent of the Title VII claim and § 1983 relief is available. *Day*, 749 F.2d at 1205. The court continued: "[h]ere the district court found that the defendants did not discriminate against the plaintiff. The only wrongful act was their retaliation for the plaintiff's actions, a violation of Title VII. We conclude that Congress did not intend this violation to be the basis of a § 1983 claim." *Id.*[3] *Day*'s result is on square footing with the Fifth circuit's decision at issue. "As Jackson alleges racial discrimination as the sole basis for his § 1983 claim, he has not identified a separate

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> specific provisions of the law. Section 1985(3) expressly authorized compensatory damages; punitive damages might well follow. The plaintiff or defendant might demand a jury trial. The short and precise time limitations of Title VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.
>
> *Novotny*, 442 U.S. at 375-76.

[3]The Sixth Circuit has recently held, again, that an employment discrimination plaintiff who does not allege violations of separate constitutional or statutory rights is restricted to Title VII for relief. The court apparently thought the proposition so unremarkable as to order the decision not published. *Willis v. Morris*, No. 95-5107, 1995 WL 613642 (6th Cir. Oct. 18, 1995).

constitutional or statutory right and thus [is limited to Title VII]. Petitioner's App. 6a n.13.

Other cases decided since *Day*, and cited by Petitioner, have reached results consistent with the Fifth Circuit's holding in the instant case. For example, in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990), the Third Circuit concluded that a plaintiff who alleged violations of Title VII, § 1983, and the First and Fourteenth Amendments was entitled to bring Title VII and § 1983 claims together. *Id.* at 1079. Likewise, *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), acknowledged that "a right created solely under Title VII cannot serve as the basis for an independent remedy under Section 1983, lest Congress' prescribed remedies under Title VII be undermined." *Id.* at 813. *Starrett* ultimately held, however, that the sex discrimination plaintiff in that case could bring a § 1983 claim concurrently with Title VII because her § 1983 claims were predicated on the First and Fourteenth Amendments. *Id.*

The Ninth and Fourth Circuit decisions in *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988), and *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987), are not to the contrary as both of those cases involved alleged constitutional violations joined with an employment discrimination claim. This proposition is also echoed in *Trigg v. Fort Wayne Community Sch.*, 766 F.2d 299 (7th Cir. 1985). The *Trigg* plaintiff brought a racial discrimination case against her state employer based only upon § 1983 and the Fourteenth Amendment. The employer took the position that Trigg's Fourteenth Amendment rights were not independent of her Title VII rights and that Title VII preempted her claims. *Id.* at 300. The Seventh Circuit rejected this argument noting that a discharged state employee's right to sue under § 1983 for equal protection

violations was well established before passage of Title VII. *Id.* at 302. Respondents do not dispute *Trigg*'s holding.

2. *Legislative history shows that Title VII is the exclusive remedy for violations of its terms.*

Petitioner also cites Title VII's legislative history as making clear "that it was Congress' intent to leave section 1983 intact and available for the redress of illegal employment discrimination." Petition, p. 11. Petitioner accurately quotes, but misinterprets, H.R. No. 92-238. The Sixth Circuit explained the distinction in *Day*:

> We believed [*sic*] the committee referred to the right to sue under § 1983 for constitutional violations or for violation of statutes which protected such employees before the enactment of the 1972 amendments. Claims under these existing laws were not affected; they could be pursued along with claims under Title VII for the purpose of obtaining additional remedies. *However, we do not read this language as expressing an intent that where employer conduct violates only Title VII, which created new rights and remedies for public employees, an aggrieved employee may sue under both Title VII and § 1983.*

Day, 749 F.2d at 1204-05 (emphasis added). The legislative history shows only that Congress resolved not to make Title VII the sole statutory remedy for employment discrimination by municipal employers when the conduct is alleged to have violated the Constitution. *See Annis*, 36 F.3d at 255 (citing *Keller*, 827 F.2d at 958-62, 965-66, which the court noted "reviewed the legislative history of Title VII in as much detail as anyone would wish").

Notably, no case cited by Petitioner discussed or perceived any circuit conflict on this issue. Indeed, they generally note their respective decisions to be consistent with other circuits. *See, e.g., Annis*, 36 F.3d at 264; *Keller*, 827 F.2d at 962; *Trigg*, 766 F.2d at 302.

C. The Fifth Circuit's decision does not conflict with this Court's rulings in *Jett* and *Johnson*.

Petitioner's contention that the Fifth Circuit's decision conflicts with this Court's decisions in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1974), similarly lacks merit as those cases are not on point or are distinguishable.

The thrust of *Jett* involved the right to recover against municipalities for the conduct of individual employees. Although *Jett* held that § 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor," the continued vitality of this ruling is called into question after the Civil Rights Act of 1991 which added § 1981(c). Section 1981 (c) provides: "the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law."

In any event, Petitioner's assertion of a § 1981 claim does not prevent dismissal of his § 1983 claim in this context for a variety of reasons. The Fifth Circuit has held that § 1981 does not apply in the discriminatory discharge context when such a claim is covered by Title VII. *Carter v. South Cent. Bell*, 912 F.2d 832, 839 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). One reason for this conclusion is that if conduct is covered by both § 1981 and Title VII, the procedures of Title VII are "rendered a dead letter." *Id.*

(citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 181-82 (1989)). *Carter* refused to stretch the protections of § 1981 to conduct that Title VII already proscribes. *Carter*, 912 F.2d at 839. To construe the cases as Petitioner urges serves only to effect an "end run" around the requirements of Title VII. Petitioner's causes of action under Title VII, § 1983, and § 1981, are all based on the same operative facts, which he has not contended invoke constitutional rights. His only ground for a § 1983 claim is alleged racial discrimination.

Moreover, to the extent such claims are not duplicative, the elements of an employment discrimination claim under § 1981 and Title VII are identical. *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 n.7 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995). Further, Petitioner has not pleaded facts sufficient to support a § 1981 claim. For these reasons, the Fifth Circuit's decision is not at odds with *Jett* or *Johnson*.

CONCLUSION

Petitioner's reading of the Fifth Circuit's decision is simply too broad. The court of appeals did not hold that Title VII preempts § 1983 in all circumstances, which appears to be the thrust of Petitioner's argument to this Court. Upon close examination, this case does not conflict with the decisions of other circuits, or decisions of this Court.

For all these reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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